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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN MISCELLANEOUS

SUIT NO. M – 9 of 2002

IN THE MATTER OF THE REMOVAL OF JANET MIGNOTT from duties as Course Director in the Conveyance and Registration of Titles course of the Norman Manley Law School.

IN THE MATTER of Letter dated November 16, 2001 from the Principal of the Norman Manley Law School to Janet Mignott.

IN THE MATTER of the Council of Legal Education Professional Law School Regulation 2000

REGINA v. THE PRINCIPAL OF THE NORMAN MANLEY LAW SCHOOL, Ex parte JANET MIGNOTT.
Miss Marcia Elliot for the applicant with Applicant Miss Janet Mignott present.
Mr. Allan Wood for the Council of Legal Education and the Principal of the Norman Manley Law School, instructed by Mrs. Susan Risden -Foster of Livingston Alexander and Levy.
The Principal of the Norman Manley Law School, Mr. Keith Sobion and Senior Tutor, Miss Dorcas Whyte present.

Heard: April 11, 2002, April 25, 2002, May 3, 2002, May 17, 2002

DAYE J (Ag.)

The Applicant is an Attorney-at-Law and Associate tutor at the Norman Manley Law School, Mona, Jamaica established in 1975. This is one of three law schools established under the Council of Legal Education to provide postgraduate professional legal training in the Caribbean. Without certification from one of these law school persons in any of the Caribbean participating territories to the Treaty of 1974 creating the Council of Legal Education will not be able to apply to practice law as an attorney-at-law in any such territory. This is subject to any government of the region adopting a Reservation to this clause of the Treat of 1974 of which Bahamas and Cayman Islands did so in 1974.

Without a doubt the Norman Manley Law School is the premier institution responsible for providing legal education and training for the legal profession in Jamaica and other relevant territories of the Caribbean. Therefore, the Law School is a principal agent and one of the first provider to the general administration of justice in Jamaica and in the Caribbean. Its activities are therefore, of great importance to the student, academic, administrative and other staff of the Norman Manley Law School, the student, academic administration and other staff of the University of the West Indies, the legal profession, the participating

governments of the Caribbean and the public who has an interest in the good administration of justice.

As indicated the Norman Manley Law School was established under the Council of Legal Education. Counsel for the respondent in his helpful submission, which is agree with on this point and some others, pointed out that the Council of Legal Education was created by The Council of Legal Education Act, 1974. On the 'Council' was conferred legal personality, the power to contract and the right to sue and be sued. Therefore, the 'Council' is a statutory body or statutory corporation and certainly has public duties and functions.

Nothwithstanding the public importance of the "Council", the Law School, the Principal and their respective public duties this does not per se introduce any element of public law in disputes between them and their staff to attract the remedies of administrative law. There is "no warrant for equating public law with the interest of the public" for "the interest of the public per se is not sufficient" (per Sir John Donaldson M.R. R.v. East Berkshire Health Authority, ex parte Walsh [1984] 3 All E.R. 427 at 430 para g to L) (authority cited by Counsel for respondents for this any other proposition).

The applicant applies by ex parte summons dated 6th February 2002 for leave to apply for an order of Certiorari; and or an order of Mandamus, and or a Declaration in respect to certain alleged decision or indecision of the Principal of the Norman Manley Law School. In other words the applicant is asking for leave to obtain an order of certiorari for the removal of the decision(s) of the Principal of the Norman Manley Law School into the Supreme Court in order that the decision(s) may be quashed.

The right, manner, method, time and qualification to apply for an order of certiorari, mandamus or prohibition is provided for by sections 564 A to 564 J of the Judicature (Civil Procedure Code) (Amendment) (Judicial Review) Rules, 1998. The rules repealed and replaced similar sections under the Judicature (Civil Procedure Code Law. Cap. 177. Therefore, a person or persons has the following:

(a) The right to apply – by way of application for judicial review (Sec. 564 A).

(b) Method of application – application for leave shall be made ex parte by filing notice and affidavit before application for judicial review (Sec. 564 C)

(c) Manner of application - relief for order of Certiorari, mandamus, prohibitions may be

joined with relief for declaration or injunction, - (sec. 564 B),

(d) Time – application for judicial review to be made promptly and in any event within 3 months from the date when grounds for the application first arose except the time period is extended for good reason – (sec. 564 D),

(e) Qualification – to the applicant must have "sufficient" interest in the subjected matter of application (i.e. locus standi) - (sec. 564 C) (8).

When this ex parte application for leave first came on for hearing on April 11, 2002. I adjourned it and gave directions that the ex parte summons and the affidavit of the applicant with its exhibit should be served on the Respondent, the Principal of the Law School to enable him to attend and appear and make representation whether leave should be granted for judicial review. The reason this course was taken was because on the material available to the court, i.e. the affidavit of the applicant dated the 6th February, 2002 which exhibited letters dated the 4th July, 2002 and the 16th November 2001, which purportedly contain the decision of the Principal to relieve her as Course Director, there was uncertainty whether any final decision was made about which the applicant complained of. If there was no final decision then there was nothing to move for judicial review. The course I took was in

keeping with the approval laid down by Lord Donaldson M.R. on how to deal with an application before a single judge when he is considering whether to grant leave to move for judicial review. In R. v. Legal Aid Board, Ex parte Hughes [1992] T L.R. 499 Lord Donaldson M.R. said as follows:

> **" On an ex parte application, leave ought only to be given if prima facie there was already clearly an arguable case for granting the relief claimed. That was not necessarily to be determined on a "quick perusal of the material" although any in-depth examination was inappropriate. Equally, it was only where prime facie there was clearly no arguable case that leave should be refused ex parte. There was, however, a middle ground relating to a small category of cases where more information was needed. In such cases it was appropriate to adjourned the application for an inter partes hearing which would be quite different from a substantive hearing in that the respondent needed only to summarize its answer sufficiently to enable the judge to decide whether or not there was an arguable case"** (emphasis mine).

What is clear from this judgment is that the test to be applied by a single judge when deciding whether or not to grant leave to move for judicial review is whether or not the Applicant has a prime facie arguable case. The judgment of Lord Donaldson M.R. in the Legal Aid Board, Ex parte Hughes case (supra) impliedly adopt this same test above for ex parte application for the inter partes application for leave.

Just to say from the outset that, in my view, if on an ex parte application for leave, the application can not survive a preliminary objection

or an objection in limine such as the court has no jurisdiction to hear it because it is founded in private Law, i.e. contract, tort, or any private right conferred by statute and not in public law, then it will fail the test that there is a prime facie arguable case.

In response to the Court's direction the ex parte summons and affidavit of the applicant was served on the respondent who appeared with counsel on the 25th April, 2002. No reply was filed in response to the applicant's affidavit.

The decision which the applicant complained about and about which the court sought clarification is allegedly contained in letters of the principal of the Law School dated July 4, 2001 and November 16, 2001. The applicant complained about the second paragraph of the letter, which reads to the effect:

> "As a consequence of these investigations and with a view to ensuring the continuity and the integrity of the teaching programme for the academic year 2001 – 2002, I am to relieve you, with immediate effect, from responsibility as Course Director of the Conveyance Course. You will be assigned duties with respect to other area(s) of the Law School's programme as soon as I am able to consult with the Senior Tutor on the proposed timetable and tutorial assignments for the academic year 2001-2002".

This she contends terminated her position as Course Director before the results of report of the investigations the Principal instituted about differences between examiners of the Conveyance Course and some complaints from concerned students about the teaching of the said course.

Further she contends that by the direction of the Principal in his letter of November 16, 2001 her then position as Course Director was the same as at July 4, 2001 letter. In paragraph 1 of the Principal's letter, he said:

"... I am now in a position to give the following directions".

And further in the penultimate paragraph he said:

> "In the circumstances, I will not be prepared to make any definite decisions with respect to those matters at this time. I am however of the view that the settled timetable arrangements for the academic year 2001 – 2002 should not be disturbed when you return to active duty. You should therefore, arrange to meet with the Senior Tutor (Acting) prior to your return to ensure the smooth continuation of these tutorial duties to which you are assigned".

The applicant makes certain other complaints about the letter dated 16th November, 2001 that it took into account and was influenced by what in effect she claims were extraneous materials which was not part of the terms of reference of the investigations. The Principal expressly stated that he would not make any definite decisions on those matters. In fact she seeks a

Declaration that the Principal's direction that there is urgent need to (i) "review the structure and teaching method being used in the conduct of the conveyance course" and " (ii) address our attitudinal problems which may affect the collegiate responsibility of the tutors is ensuring the school continues to provide quality legal education", is invalid and ultra vires. She appears also to be seeking a Declaration in the same paragraph to which she applies for an Order of Mandamus, for a determination whether the criteria and standard adopted for the teaching of the conveyance course are a fair assessment of the students capability at the level of their training.

She is also seeking a declaration on whether there was a consensus between course tutor, associate tutor and other persons marking scripts and reviewing grades for assignment and examination questions for the period September, 1998 to August, 2001 to the answers and to the standard of the students. The two letters the applicant exhibit are part of her affidavit. Her Affidavit is not challenged and intentionally so say the respondent Counsel, due to their submission that the application is misconceived.

Mr. Allan Wood submit in respect to these letters the following:

In the letter of the 4th July, 2001, the principal relieved the applicant as Course Director of the Conveyance Course for the academic year 2001 – 2002 and the principal letter dated 11th November, 2001 took no further action

about the applicant or on the 'Report of Student Concerns' after the date of July 4, 2002. In any event I find on the applicant's affidavit the following relevant fact

(a) The applicant is an attorney-at-law and was employed By the Council of Legal Education, as Course Tutor in Conveyance and Registration of Title Course at the Norman Manley Law School.

(b) She commenced employment with the Council in September, 1997.

(c) Up to the date of 6th February, 2002, she was still employed to the Council.

(d) Her employment was by a contract of employment of which no details are given of the terms and conditions.

(e) Sometime between September, 1997, and July 4, 2001, the Applicant was assigned duties as Course Director for Conveyance and Registration of Title Course.

(f) Principal of the Norman Manley Law School by Letter dated 4th July 2001 relieved her of duties as Course Director pending investigation into the failure of the course examiners to arrive at a consensus or examination results for academic year 2001-2002 and into complaints of concerned students about the Conveyance Course.

(g) The applicant was re-assigned other tutorial duties at the Norman Manley Law School after July 4, 2001. She suffered no loss or reduction in salary or other allowances.

(h) After receiving the report of the investigation he instituted the Principal of the Norman Manley Law School directed that the Applicant continue the reassigned duties on resumption of her leave. This decision was contained in letter to the applicant dated November 16, 2001.

(i) That this decision was to take effect for the academic year 2001 – 2002. Therefore the applicant was in effect for period no longer Course Director for the Conveyance Course.

(j) No final decision has been taken about the applicant's position, as Course Director.

In view of the fact that the applicant was still in the employment of the Council of Legal Education then she is not and cannot complain that she was dismissed from her employment or that her employment was terminated. She can only be complaining that she was deprived wrongfully or without hearing of some benefit or gain, which arises, from her contract of employment or for that matter from statute. On the face of this complaint she would have satisfied the condition of sec. 564 C (8) of the C.P.C. Law Cap. 177 of having "sufficient interest" in the subject matter of the application (i.e. locus standi) at the ex parte and the inter partes stage of her application. For if an applicant for the judicial review has a direct personal interest in the relief which he is seeking he will very likely be considered as having "sufficient interest" in the matter to which the application relates. (The Supreme Court Practice Vol. 1., Part 1. 1991 ed. P. 834, para. 53/1 – 14/33)(i.e. White Book). These

paragraphs considered what is "sufficient interest" within the terms of 0.53, R.3 (7) which is similar to sec 564 C (8) of the C.P.C law, Jamaica.

What is not "sufficient interest" on an ex parte or inter partes application for leave was addressed in the same paragraph referred to. It is not "sufficient interest" if the applicant's interest in the subject matter is not direct or personal but is a general or public interest. In relation to this application for an order of Declaration the applicant is contending and complaining of the quality and standard of legal education of the student of the law school. She is attacking the alleged in decision of the Principal of the Law School to address this urgently. In my view this claim would fall in the category of "general any public interest" and not an interest in the subject matter that directly and personally concerns her. Therefore she would not satisfy the requirement of "sufficient interest" on her ex parte or inter partes application for Declaration. For on this claim she would have fallen in a class of person popularly referred to as a "private attorney-general" for which the formula "sufficient interest" is not intended (The Supreme Court Practice page 824, supra).

Mr. Allan Wood Counsel for the Respondent, without challenging the affidavit evidence, opposed the application for leave on three grounds.

1. The application was out of time because it did not satisfy the requirement of sec. 564 (d) (1) of Judicature (Civil Procedure Code) Amendment) (Judicial Review) Rules 1998. This section required that the application shall be made promptly and in any event these months from the date when the grounds of the application first arose ... unless there is good reason for extending the period. He submits the application was neither prompt or within 3 months. The reason being the ground for the application was stated as being the decision of the letter of July 4, 2001 but the application was not brought until February 6, 2002 some 7 months later. In any event Mr. Wood submitted that her ground for application arose on the 16th November,2002, it was not prompt within the meaning given to "promptly" by Sir Donaldson M.R. in R v. Independent Television Commission, Ex parte T V N 1 Ltd et al (1991) T.L.R. 606 who stated that such application are to be made with its most promptness particularly where third parties rights may be affected. The students who are about to start examination are third parties who would be immediately affected adversely by granting leave on this application. He also relied on as the authority of R v. Stafford-on-Avon District Council et al, ex parte Jackson [1985] 3 All E.R. 769 for the proposition on what is a prompt application and what is good reason for extending time. He also cited 1995 of the Supreme Court Practice p. 865. para 53/1 – 14/31.

The applicant, responded to this ground and others

on her own behalf. Counsel for the respondent is Mr. Allan Wood objected that she should not address as Counsel Ms Marcia Elliott announced her appearance on behalf of the Applicant. Out of deference to the applicant as an attorney-at-law the court is allowed her to address. She submitted the relevant date when the ground of application arose was November 16, 2001 and the application was within the 3 months requirement. Even if it was not on the basis that the issue raised was of great importance time can be extended out of the 3 months period (R v. Taylor J. R v. Home Secretary, Ex p. Ruddock (1987) W.L.R. 1482 oto 1485 para 6).

In my view the relevant date when the ground of application arose ought to be taken from the 16th November, 2001. It was only when nothing further was said about the applicant's position as Course Director of the Conveyance Course that one could reasonably take a view that the applicant could have been relieved permanently as course director from the letter of July 4, 2001. Therefore, I find that the application is not out of time and it is not necessary to consider the merits of an application for extension of time which was not made.

2. There is no material before the court by which the applicant can demonstrate that her rights are other than as an employee of the Council of Legal Education. It is well established on the cases that employment to a statutory body, such as the Council of Legal Education, does not give a person the right to

challenge the decision affecting their performance of their duty by proceeding of judicial review. There is no statutory provision that confers on any tutor on employee any protection or any stipulated procedure that must be followed when taking such a decision in relieving the applicant whether by way of disciplines or even constructive dismissal. When the applicant has not shown any necessary public law element she should be left to the usual private law remedies for breach of contract or remedies offered by the Industrial Dispute Tribunal (R v East Birkshire Health Authority, Ex Parte Walsh supra.) (senior nursing officer dismissed by statutory Authority.) R v. Binger, Vaughn and Scientific Research Council, Ex Parte Babo Squire (1984 21 J.L.R 148 (Senior Research Scientist dismissed by agents of Scientific Research Council). The applicant responded that the issues raised was within the realm of public law, she was seeking judicial review of the process and decision and proper performance by the council of a public duty. This was not ruled out by her employment to the Council. She then relied on Kent v. University College London (1992) T.L.R 65 per D. Hon L.J at para 6. and R v. Civil Service Appeal Board (1988) 3 All E.L. 687. (per Rock J. para c.d.)

Mr. Allan Wood then distinguished this case from the instant application.

The applicant relied on several other authorities in her address to support the claim that a university decision is amenable to judicial review.

The authorities are (a) R v. Hull University, Visitor, Ex Parte Page 1991 1 W.L.R 1277, Thomas v. University of Bradford 1987 2 W.L.R 677, Council of Civil Service Unions v. Minister for the Civil Service (H.L.C.E.) (1985) ALL E. R. 374, R. v Aston University Sorate, Ex Parte Roffer et al.

I hold these cases do not derogate from the principle in the case of pure master and servant falling out side public law but falling within private law remedies.

3. The principal of the law school is sued as an agent of the Council and is not a proper party to be sued. No specific address was made to this submission in reply.

The Privy Council in dealing with the application of certiorari by a professor and head of the department of economic and business administration to quash the decision of the University Council, a statutory body, for dismissing him was enunciated in Vidyodaya University of Ceylon and others v Silva [1964] 3 All E.R. 364. Lord Morris of Borth - Y- Gest at page 67 para (b– e) said:

"The law is well settled that if, when there is an ordinary constractural relationship of master and servant, the master terminates the contract the servant can not obtain an order of certiorari. If the master end rightfully the contract there can be no complaint: if the master wrongfully ends the contract the servant can pursue a claim for damages".

His Lordship then relied on Ridge v Baldwin [1963] 2 All E.R 66 where Lord Reid stated the principle as follows:

> **"The law regarding master and servant is not in doubt there can not be specific performance of a contract of service and the master can terminate the contract with his servant at any time and for any reason or for none. But if he does so in a manner not warranted by the contract he must pay damages for breach of contract. So the question in a pure case of master and servant relationship does not all depend on whether the master has heard the servant in his own defence, it depends on whether the facts emerging at the trial prove breach of contract. But this kind of case can resemble dismissal from office where the body employing the man is under some statutory or other restriction as to the kind of contract it can take with its servants, or the ground on which it can dismiss them".**

The Board then considered whether the professor had any other position or status than that of an employee or servant of the university. The court then examined the relevant provisions of the University Act of 1958 which created the University Council. It is concluded there was no provision in the Act of 1958 giving a right to be heard or right to appeal to any other body because the applicant's case was a pure master and servant relationship.

The principle of this case was accepted and applied by Smith C.J. in R v Dr. A. Binger and MRS N.J. Vaughn, Ex parte Bobo Squire supra in the Full Court of Jamaica. There, the applicant, Senior Research Scientist, employed to Scientific Research Council, a statutory body applied for an Order of certiorari to quash the decision of the Council to suspend and, then dismiss him through its agents without a hearing. The Full Court upheld a preliminary objection, after examing the Scientific Research Council Act, that the applicant was employed under an ordinary contract and the relevant statute did not confer a status on him other than in a pure master and servant relationship.

Smith C.J. accepted Lord Wilberforce's explanation of Lord Reid's description of a "pure case of master and servant" in Mulloch v Aberdeen Corporation (1971) 2 All E.R 1278 at 1294. Lord Wilberforce said (ibid)

> "If any of these elements exist then in my opinion what ever the terminology used, and even though in some inter parties aspects the relationship may be called master and servant, there may be essential procedural requirements to be observed and any failure to observe them may result in a dismissal being declared null and void".

On appeal from the Full Court decision Carberry J.A. approved the principles and approach of Smith C.J. and found of the Senior Research Scientist that his case was a simple master and servant or employer and employee relationship and neither certiorari nor a declaration could be made out. Carey J.A opined the Court of Appeal was bound to follow the decision of the Privy Council in Vidyodaya's case even though Lord Wilberforce had criticized it in Mulloch's case on the ground that the statutory provision in England and Scotland would not permit a teacher to be dismissed without affording a right of hearing. Carey J.A. found that the contract of employment in Binger's case was not buttressed by any statutory or procedural requirement as to dismissal or termination. He found too that neither a declaration certiorari would be granted.

Therefore the issue is whether the contract of employment of the applicant is buttressed by any statutory or procedural requirement about, not her dismissal, but her removal from the benefit or gain as Course Director. In other terms whether there is any public element injected or underpinning her contract of employment (East Birkshire case –).

I have examined the Council of Legal Education Act 1974 and find that the Council:

(1) appoints the Principal of each Law School and

all necessary staff.

(2) has power to make regulations for courses and examination of the Law School.

(3) Delegates the responsibility for the organization and administration of the Law School and of the courses of study to the Principal.

Under Council of Legal Education Professional Law School Regulation 2000 and particularly regulation 2 of the Regulations for the Conduct of Examinations and Assessments the Principal is given a discretion to assign a member of his staff including Associate Tutor to teach any subject of the course.

There are no other provisions that place any restriction on the Council or Principal with respect to the staff of the Law School. The Council is free to regulate its own procedure in matters of it staff under the Act.

It is my view based on the provisions of the Act that it is an implied term of the contract of employment of the Council and its staff including Associate Tutors that each staff is under the supervision of the Principal. It is my view also that it is an implied term of the contact that each member of staff or tutor can be assigned or re-assigned duties in relation to any course of the Law School and any complaint or dispute about this sounds in contract i.e. private law and not public law.

Mr. Justice Carey Judge of Appeal in Binger's case (supra) emphasized that the remedies for judicial review are discretionary. They were subject to the common law, especially the rule in contract that a court will not grant specific performance of a contract of employment 'in the absence of special circumstances'. He said if the effect of granting the remedy of Certiorari or Declaration would be to enforce specific performance of contract of employment then either remedy would not be granted. The effect of asking to obtain Certiorari or Mandamus by the applicant in respect to her position as Course Director would be to enforce specific performance of an implied terms of the contract of employment. This would not be entertained or granted in public law or administrative law. The contract of the applicant is a simple contract of employment. It is not buttressed by any statutory or special procedure about assignment or re-assignment of her duties. Her contract is not injected with or is underpinned by any public law element. Therefore the preliminary objection to her ex parte or inter partes application for leave in our court will be upheld. If the preliminary objection will be upheld on the principle accepted by the Court of Appeal then she does not have a prima facie arguable case.

Therefore although there is "sufficient interest" in her ex parte or inter partes application in one respect and her application is within the three months she does not have a prima facie arguable case.

Accordingly her application for leave to apply for an order of Certiorari, Mandamus and Declaration is refused.